

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

July 24, 2000

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. CENT 99-152-RM
	:	CENT 99-154-RM
REINJTES OF THE SOUTH, INC.	:	CENT 99-195-M
	:	CENT 99-335-M

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DIRECTION FOR REVIEW AND ORDER

BY: THE COMMISSION

In these consolidated contest and civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Reinjtes of the South, Inc. ("ROS") filed with the Commission a motion to reopen and remand Administrative Law Judge Avram Weisberger's June 20, 2000, Decision Approving Settlement. For the following reasons we direct review in this case, vacate the judge's decision, and remand it to him for further proceedings.

ROS had agreed to settle the two citations at issue in the case by, among other things, paying the full \$55,131 in penalties that was sought, and had signed a Stipulation and Motion to Approve Settlement Agreement and forwarded it to the Secretary of Labor. After doing so, however, and before the Secretary could sign the document and file it with the judge, ROS filed a Motion to Stay. Therein ROS requested the judge stay proceedings and postpone approval of the stipulation and settlement agreement until the United States Court of Appeals for the Fifth Circuit ruled upon the jurisdiction of the Department of Labor's Mine Safety and Health Administration over the alumina refining process, which is at issue in *In re: Kaiser Aluminum and Chemical Co.*, 5th Cir. No. 99-31072. Over the Secretary's objection, the stay was granted by the judge on January 6, 2000.

In a decision issued June 12, 2000, the Fifth Circuit panel hearing the *Kaiser* case ruled that MSHA has jurisdiction over alumina plants. Consequently, on June 15, 2000, the Secretary filed with the judge and served upon ROS a motion to lift the stay and approve the settlement agreement. According to its motion to the Commission, ROS never consented to the Secretary's

motion, and did not receive it until June 19, 2000. Mot. at 2 & n.3. The following day, before ROS could respond to the motion, the judge issued a decision lifting the stay and approving the settlement agreement.

ROS now requests that the Commission reopen the judge's decision and remand it to him in order that ROS can have the opportunity, provided for in the Commission's regulations, to file a response to the Secretary's motion. Mot. at 3. Because ROS and the operator in the *Kaiser* case have the same counsel, ROS states that it can represent that a petition for rehearing in the *Kaiser* case will be filed in the Fifth Circuit by July 27, 2000, and that it was thus premature for the stay to be lifted and the settlement approved. *Id.* at 3 & n.4. The Secretary has informed the Commission by letter that she does not oppose the relief ROS seeks.

ROS should have been afforded the opportunity to respond to the Secretary's motion before the motion was acted upon. *See* 29 C.F.R. § 2700.10(c) ("A statement in opposition to a written motion may be filed by any party within 10 days after service upon the party."). As the Secretary correctly pointed out in her letter, however, the judge's decision is not yet a final order of the Commission under section 113(d)(1) of the Mine Act. *See* 30 U.S.C. § 823(d)(1). Consequently, to grant ROS the relief it seeks we will treat its motion as a petition for discretionary review and grant review under Mine Act section 113(d)(2). 30 U.S.C. § 823(d)(2). We also vacate the judge's decision and remand the case to him so that ROS can file a response to the Secretary's motion and the judge can consider that response in ruling upon the relief requested by the Secretary.

Accordingly, this case is remanded to the judge for further proceedings consistent with this decision.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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